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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

CLARENCE MOORE

v.

UNITED STATES OF AMERICA,

CLARENCE MOORE,
Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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October 19, 1984

QUESTIONS PRESENTED

1. Whether the United States is barred from collecting the civil penalties sought, because it arbitrarily, capriciously, unreasonably, erroneously and without authority, failed to act in conformity with the procedure provided by law in assessing such penalties, with prejudice to Petitioner.

2. Whether the lower courts erred in granting summary judgment to the United States when the record, taken in light most favorable to Petitioner, showed he was not involved in the relevant mining operations and by law was not subject to the Surface Mining Control and Reclamation Act.

3. Whether the lower courts erred in ruling that Petitioner was not entitled to judicial review under the Administrative Procedure Act.

4. Whether 30 USC Sec. 1268(c) is unconstitutional as applied or on its face so that judicial review cannot be foreclosd despite a failure to prepay a penalty.

PARTIES

Petitioner: Clarence Moore

Respondent: United States of America

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REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF LOWER COURT OPINION

The text of the Orders, Memoranda, and Opinions of the lower courts are reproduced in the Appendix. The district court's orders and memoranda entered October 29, 1982 and December 13, 1982, are reported at ____ F.Supp. ____ (E.D. Tenn. 1982). The order of the Court of Appeals entered July 24, 1984, is unpublished.

STATEMENT OF GROUNDS ON WHICH JURISDICTION INVOKED

The Petitioner (and co-defendant below, Julian H. Crews, who is not a party to this Petition) was found liable for a civil penalty in the amount of $45,000.00 by final order of a district court pursuant to the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. Sec. 1201 et seq., Petitioner appealed to the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. Sec. 1291.

The Court of Appeals affirmed the district court's ruling by a final order filed on July 24, 1984. The right of appeal is not available in this action.

The Petitioner respectfully seeks further review of this case by requesting the Court to grant this

Petition for Writ of Certiorari, submitted pursuant to 28 U.S.C. Sec. 1254(1), timely filed under 28 U.S.C. Sec. 2101(c).

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS

(All references to the record are to the Joint Appendix filed by the parties in the Court of Appeals)

The Petition of Clarence Moore arises from a final judgment on December 13, 1982, by the United States District Court for the Eastern District of Tennessee, Northern Division. Summary judgment was entered in favor of the United States on October 29, 1982, and a subsequent order was entered on December 13, 1982, disposing of a motion filed by Petitioner to amend or to reconsider the initial judgment.

The Complaint was brought by the United States on September 2, 1982, for the collection of civil penalties

allegedly owed by Petitioner and Julian H. Crews d/b/a D.C. Coal Company, pursuant to 30 USC Sec. 1268(d) of the Surface Mining Control and Reclamation Act of 1977, 30 USC Sec. 1201 et seq. (JA p. 3). Julian H. Crews and D. C. Coal Company are not parties to this Petition, but will be referred to from time to time when relevant and for purposes of clarity. The civil penalties were allegedly owed in accordance with 30 USC Sec. 1268(b) and (d). (JA p. 3). The United States sought penalties in the amount of Forty Five Thousand Dollars ($45,000.00). (JA p. 4).

An Answer and Counter-Claim was filed on October 4, 1982. On October 12, 1982, Petitioner filed a motion for judgment on the pleadings or in the alternative for summary judgment,

with supporting brief. An Amendment to Answer was filed on October 14, 1982.

The United States filed a reply to the counter-claim and a cross-motion for summary judgment, with supporting brief, on October 19, 1982. A motions hearing was held on October 29, 1982, on the cross motions of the parties.

Honorable Robert L. Taylor, judge, presiding, entered an Order with Memorandum on the day of the hearing granting summary judgment in favor of the United States in the amount of Forty Five Thousand Dollars ($45,000.00). Subsequently, on November 1, 1982, Petitioner filed a response to the United States' cross-motion for summary judgment, with supporting memorandum and affidavit.

On November 8, 1982,

Petitioner filed a motion to amend the judgment or in the alternative to reconsider, with supporting memorandum. An initial Notice of Appeal was filed on November 26, 1983, but on November 29, 1982, the United States responded to the motion to amend or reconsider.

The District Court on December 13, 1982, entered an Order granting the motion to reconsider to the extent set forth in a supporting memorandum. The action of the District Court on December 13, 1982, necessitated the filing of a new Notice of Appeal under Rule 4(a)(4) of the Federal Rules of Appellate Procedure. The new Notice of Appeal was filed on December 30, 1982, and docketed in the United States Court of Appeals for the Sixth Circuit as Case No. 83-5014 on January 13, 1983. The initial appeal of this case, docketed as

Case No. 82-5742, was dismissed on January 11, 1983, by an order entered upon consideration of the stipulation of the parties to voluntarily dismiss the case pursuant to Rule 42 and Rule 4(a)(4) of the Federal Rules of Appellate Procedure.

II. STATEMENT OF THE FACTS

The relevant facts are contained in the Complaint, Answer and Affidavits filed in this cause in the District Court and as revealed in the transcript of proceedings held October 29, 1982, on the respective motions of the parties.

The Complaint alleged that both Petitioner and Crews operated a surface coal mining and reclamation operation in Campbell County on which certain violations occurred giving rise to the civil penalties sought. The United States brought the action on penalties assessed pursuant to Cessation Order (CO) 200228, for which a proposed assessment of civil penalty was issued on April 2, 1982. (JA p. 3). The proposed assessment was issued nearly three (3) years from July 2, 1979, the

issue date of CO 200228. (JA p. 20).

A final order was issued on June 1, 1982, requiring payment of the civil penalty in the amount of $45,000.00 (JA p. 20). The United States claimed that the civil penalty had not been paid and had not been placed in escrow and Moore and Crews had, therefore, waived all legal rights to contest the existence of the alleged violations and the amount of the penalty pursuant to 30 USC Sec. 1268(c). (Complaint, p. 1).

Petitioner did not deny a failure to pay the amount of the proposed assessment into escrow. (JA p. 20). However, Petitioner averred that at no time during which any available administrative remedy was open to him could he have afforded to either pay the penalty or place the amount in escrow

while seeking administrative relief. (JA p. 20 and p. 72).

CO 200228 was issued on July 2, 1979, for failure to abate violations cited in Notice of Violation (NOV) 79-II-11-15 (originally issued erroneously as NOV 79-II-11-5). (JA p. 24 and p. 27). NOV 79-II-11-15 was issued on May 11, 1979, on an area identified only as a surface mine in Campbell County, Tennessee. (JA p. 28). The following violations were cited: 1) failure to pass surface draineage through a sedimentation pond, 2) failure to post blasting signs at mine entrances, 3) failure to remove all topsoil to be salvaged before mining operations, and 4) failure to construct and maintain access and haul roads, culverts, ditches and right of ways to prevent addition of suspended solids to

stream flow. (JA p. 30 and p. 31).

Petitioner denied any participation in the minesite or mining operations on which NOV 79-II-11-15 and CO 200228 were issued. The only connection between Petitioner and the minesite in question was equipment he had leased to Crews on April 19, 1979. (JA p. 72 and p. 74).

The failure of the United States to abide by the statutory requirements and regulations resulted in prejudice to the rights of Petitioner. (JA p. 72).

ARGUMENT

I. THE UNITED STATES IS BARRED FROM COLLECTING THE CIVIL PENALTIES SOUGHT, BECAUSE IT ARBITRARILY, CAPRICIOUSLY, UNREASONABLY, ERRONEOUSLY AND WITHOUT AUTHORITY GROSSLY FAILED TO ACT IN CONFORMITY WITH THE PROCEDURE PROVIDED BY LAW IN ASSESSING SUCH PENALTIES, WITH PREJUDICE TO PETITIONER.

Petitioner respectfully contends that he has the right, through judicial review, to show that he was prejudiced by the government's gross failure to comply with 30 USC Sec. 1268(c), and the United States is barred from collecting the civil penalty of $45,000.00.

The decisions which thusfar have upheld the constitutionality of 30

USC Sec. 1268(c) are not controlling in this case. The following cases, on facts vastly different from the instant case, have upheld the constitutionality of 30 USC Sec. 1268(c): Graham v. Office of Surface Mining Reclamation & Enforcement, 722 F.2d 1106 (3rd Cir. 1983); B & M Coal Corp. v. Office of Surface Mining Reclamation & Enforcement, 699 F.2d 381 (7th Cir. 1983); Blackhawk Mining Co. v. United States Department of the Interior, 711 F.2d 753 (6th Cir. 1983); United States v. Log Mountain Mining Co., 550 F.Supp. 811 (E.D. Tenn. 1982); John Walters Coal Co. v. Watt, 553 F.Supp. 838 (E.D. Ky. 1982), United States v. Crooksville Coal Co., 560 F.Supp. 141 (S.D. Ohio 1982).

None of the cases cited above involved a difference of three years from the issue date of a violation to

the issuance of a proposed notice of assessment. In the instant case, CO 200228 was issued on July 2, 1979, but the proposed notice of assessment was not issued until April 2, 1982. (JA p. 20 and p. 3).

The Department of the Interior and the Secretary have taken the position that that portion of 30 USC Sec. 1268(c) which requires that an operator be informed of a proposed assessment within 30 days of the issuance of an NOV or CO may bar collection of any penalty assessed in violation of the 30-day requirement. Save Our Cumberland Mountains, Inc. v. Watt, 550 F.Supp. 979, 982 (D.C. 1982) rev'd 725 F.2d 143, judgment and opinion vacated on rehearing en banc (D.C. Cir. April 2, 1984). The Secretary also has taken the position that a showing of

actual prejudice by an operator will bar imposition of a penalty assessed in violation of the 30-day requirement of 30 USC Sec. 1268(c). Id. at n.4. In either case, collection of the staggeringly large penalties the United States has imposed against Petitioner should be barred.

Significantly, the word "shall" when used in the penalty and enforcement provisions of the Act, was construed by the Court in Save Our Cumberland Mountains, supra, as imposing a mandatory duty on the government to act in accordance with the provision of the statute to which it applies. Id. at 982. 30 USC Sec. 1268(c) in pertinent part provides:

> "Upon the issuance of a notice or order charging that a violation of the Act has occurred the Secretary shall inform the operator

> within thirty days of the proposed amount of said penalty."

The requirement of notification within 30 days is unequivocal and cannot be presumed to be a gratuitous addition to the statutory provisions. Congress could have easily provided that the Secretary inform an operator within a "reasonable time" of the proposed amount of a penalty; instead Congress provided that the Secretary "shall inform the operator within 30 days"of such amount. The intent of Congress is clear and unambiguous and should not be judicially abrogated. Hodel v. Virginia Surface Mining & Reclamation Assoc. 452 US 264, 304, 69 L.Ed. 2d 1, 33, 101 S.Ct. 2352, 2374 (1981).

The government previously has argued that Petitioner actually benefitted from the three-year delay in

assessing the penalty because penalties were higher in 1979, when the NOV 72-II-11-15 was issued, than in 1982, when the government finally assessed the penalty of $45,000. (See, District Court Memorandum, December 13, 1982, p. 2 Appendix p. 70). However, it is quite irrelevant to a dying man or woman that the life-saving operation available in 1979 for $100,000.00 is now available for $45,000.00, if they can afford neither.

The cases, cited above, neither deal with the issue of inability to pay a substantial civil penalty nor with the resulting prejudice due to the application of the prepayment escrow provision in such a case. In contrast, Petitioner could not afford to pay the $45,000 assessed against him at any time during which the government claims he

could have preserved his legal rights by doing so. (JA p. 20 and p. 72). The record shows that Petitioner may have been able to prepay the proposed assessment during the summer of 1979 had it been issued in conformity with the law, but this is by no means certain. The speculative nature of the preceding proposition is the result of the government's gross failure to comply with the law, and Petitioner should not be further penalized for the government's failure to initiate the collection process timely and properly. At any rate, the record shows that Petitioner could not afford to pay the $45,000.00 penalty when it was finally issued in the winter of 1982. And for reasons set out hereinbelow the prepayment provision of 30 USC Sec. 1268(c) works prejudice at any time when

applied to circumstances as presented in the instant case.

The multiple procedural steps included in the Act have been touted by the government as adequate safeguards to an operator's legal rights, despite the harsh prepayment provision of 30 USC Sec. 1268(c). However, under facts similar to the instant case such safeguards are illusory. This Court has suggested this view by recognizing that, "Once the escrow requirement is met, [then] the operator receives a full adjudicatory hearing, before an administrative law judge, with a right of appeal to an administrative board and judicial review of the final decision." Hodel 452 US 304, 69 L.Ed 2d 1, 33, 101 S.Ct. 2352, 2374 (1981). The government would seek to foreclose all review even if an operator cannot afford in effect

to pay for the right of appeal. Such a view is repugnant to our system of justice.

II. THE LOWER COURTS ERRED IN GRANTING SUMMARY JUDGMENT TO THE UNITED STATES WHEN THE RECORD, TAKEN IN THE LIGHT MOST FAVORABLE TO PETITIONER MOORE, SHOWED HE WAS NOT INVOLVED IN THE RELEVANT MINING OPERATIONS AND BY LAW WAS NOT SUBJECT TO THE SURFACE MINING CONTROL AND RECLAMATION ACT.

Petitioner averred that he was not involved with the mining operation or activities from which CO 200228 arose, except for the leasing of certain equipment. (JA p. 20 and p. 73). Nevertheless, the district court in the face of Moore's denial said that "Moore's involvement ... may well have been covered by the Surface Mining Act" (emphasis added), citing United States v. Dix Fork Coal Co., now officially reported at 692 F.2d 436 (6th Cir. 19).

The Dix Fork opinion applied to the instant case absolves Petitioner of liability under the Act. The Court of Appeals for the Sixth Circuit found the "agent" in Dix Fork, supra, to be

one who "had been delegated and had assumed and executed" the responsibility of ensuring compliance with the Act for his son's mining company. 692 F.2d at 441. The Sixth Circuit Court found that parallel definitions of "agent" from other statutory schemes were appropriate, noting that 30 USC Sec. 1201 et seq. contained no definition for "agent". Looking to the definition of "agent" under Title VII, 42 USC Sec. 2000 et seq., the court in Dix Fork, supra, found an "agent" was one who as a "supervisory or managerial employee ... "had authority to make employment decisions. Id.

The Sixth Circuit Court then gave the following definition from the Coal Mines Health and Safety Act:

> (e) "agent" means any person charged with responsibility for the operation of all or part

> of a coal mine or the supervision of the miners in a coal mine.

30 USC Sec. 802(e). Id.

Petitioner was not an "agent" under either definition and cannot be held responsible for alleged violations of the Act resulting in the assessment of civil penalties. It can only be presumed that the equipment Petitioner Moore leased to Crews was the only basis for naming him in NOV 79-II-11-15. The record shows that Petitioner Moore was added to the NOV three days after its issuance on May 11, 1979, absent any reasons for the action except as the "result of additional information." (JA p. 51 and p. 57).

Of course, the disputed factual issues raised would ordinarily preclude the granting of summary judgment under Rule 56 of the Federal

Rules of Civil Procedure. In considering a motion for summary judgment, the evidence is to be viewed in light most favorable to the party opposing the motion. New Jersey Life Insurance Co. v. Getz, 622 F.2d 198 (6th Cir. 1980). Further, the Court of Appeals recognized that on review it must do the same. Id. at 200. The district court and the court of appeals failed to follow the established standard. However, the essence of the lower courts' final decisions to grant summary judgment to the United States is that Petitioner Moore had no right to judicial review due to a failure to exhaust administrative remedies. Petitioner Moore respectfully disagrees with such a conclusion.

III. THE LOWER COURTS ERRED IN RULING THAT PETITIONER WAS NOT ENTITLED TO JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT.

The scope of the judicial review of agency action is found at 5 U.S.C. Sec. 706, part of what is still popularly referred to as the Administrative Procedure Act. The scope of judicial review contained within 5 U.S.C. Sec. 706 requires that the Court "hold unlawful and set aside agency action, findings, and conclusions" which, inter alia, are "arbitrary, capricious, an abuse of discretion," illegal or without observance of required procedure.

Section 706 in full provides:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law,

interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; a

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by

> statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Emphasis added).

The Department of Interior is an Executive Department specifically subject to having its actions reviewed under the Administrative Procedure Act. See, 5 U.S.C. Sec. 101, Sec. 551, and Sec. 702. An example of judicial review of action by the Department of the Interior, even though such action by statute was termed "final and conclusive", is Eskra v. Morton, 380 F. Supp. 205 (W.D. Wis. 1974) reversed on other grounds, 524 F. 2d 9 (7th Cir.

1975).

Title 5 U.S.C. Sec. 702 provides in pertinent part:

> A person suffering legal wrong because of agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that agency action or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein denied on the grounds that it is against the United States or that the United States is an indespensable party....

The presumption and policy in favor of review established by this Court is very strong. Abbott Laboratories v. Gardner, 387 US 136, 18 L.Ed 2d 681, 87 S.Ct. 1507 (1967). There is a presumption in favor of judicial review to all those suffering

legal wrong or adversely affected or aggrieved by agency action within the meaning of a relevant statute, so long as such relief is not precluded by statute nor committed by law to agency discretion. Id., 387 US at 140, 141, 18 L.Ed.2d at 687, 87 S.Ct. at 1511.

The Supreme Court in Abbott Laboratories v. Gardner, supra, in considering the Administrative Procedure Act, stated as follows:

> ... [It] provides specifically not only for review of "[a]gency action made reviewable by statute" but also for review of "final agency action for which there is no other adequate remedy in a court," 5 USC Sec. 704. The legislative material elucidating that seminal act manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the Administrative Procedure Act's "generous review

> provisions must be given a hospitable interpretation..." [Court's citations omitted]... the Court [has] held that only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review. See also, Jaffe, Judicial Control of Administrative Action 336-359 (1965).

Id. at 140, 141. (Emphasis added).

Agency action which "requires an immediate and significant change in the Plaintiffs' [person's aggrieved] conduct and their affairs, with serious penalties attached to noncompliance" requires that access to the courts be permitted under the Administrative Procedure Act and the Declaratory Judgment Act, 28 US Sec. 2201. Cf., 387 US at 153.

The Surface Mining Control and

Reclamation Act of 1977 undoubtedly is a "relevant statute" for purposes of the presumption of review under 5 USC Sec. 702. The independant jurisdiction of the district court was invoked under 30 USC Sec. 1268(d), as well as 28 USC Sec. 1345 and 28 USC Sec. 1355. These statutes certainly do not preclude judicial review. In fact, the Surface Mining Control and Reclamation Act at 30 USC Section 1276 provides for judicial review. Moreover, 30 USC Section 1276(a)(2) provides that the availability of review in a civil penalty proceeding is not to be construed to limit rights afforded by 30 USC Sec. 1270. Specifically, 30 USC Sec. 1270(c) provides:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek

> enforcement of any provisions of this Act and the regulations thereunder, or to seek any other relief (including relief against the Secretary or the appropriate State regulatory authority).

(Emphasis Added).

Petitioner Moore must be included in the broad language of 30 USC Section 1270(c) as a person who may exercise available rights such as those afforded under the Administrative Procedure Act.

The question that must now be addressed in view of the very strong presumption favoring judicial review is the effect of 30 USC 1268(c). Petitioner Moore, for reasons stated hereinabove, did not prepay the $45,000.00 civil penalty assessment into escrow as purportedly required to seek judicial review. The Act through 30 USC Section 1268(c) provides that failure to

prepay the penalty will result in a "waiver of all legal rights to contest the violation or the amount of the penalty." Petitioner Moore does not seek per se to contest the "violation" or the "amount" of the penalty. So far as Petitioner's rights under the Administrative Procedure Act are concerned, he requests this Court to consider whether the Government acted arbitrarily, capriciously, or illegally in assessing a $45,000 penalty in April, 1982, pursuant to a Cessation Order issued on July 2, 1979, when he was not involved at the minesite in question and he has been prejudiced thereby.

In light of the strong policy favoring judicial review, Petitioner Moore must prevail unless the United States can show "clear and convincing evidence of a contrary legislative

intent...." See, Abbott Laboratories v. Gardner, supra. The United States can not produce such clear and convincing evidence. Petitioner Moore respectfully submits that he is entitled to judicial review to determine if the agency acted illegally, arbitrarily, in abuse of its discretion, or capriciously. The relevant statute, 30 USC Sec. 1201 et seq., does not preclude review (and in fact provides for review), and the strong presumption of review afforded by 5 USC Sec. 702 is intact and controlling. Standard Oil Co. v. Federal Energy Administration, 440 F. Supp. 328 (N.D. Ohio 1975).

The proposed notice of assessment on the cessation order was issued on April 2, 1982, nearly three years after the issuance of the cessation order, in gross violation of

the 30-day requirement of 30 USC Sec. 1268(c).

The arbitrary action and unreasonable delay and failure of the agency to follow the prescribed procedures resulted in prejudice to Petitioner Moore. Procedural irregularities alone, if prejudicial, are grounds for reversal of agency action. Cf., State of Georgia, Department of Human Resources v. Califano, 446 F. Supp. 404, 410, 411 (N.D. Ga. 1977). The arbitrary, capricious and legally unfounded action of the agency in this case is so erroneous on its face as to be reversed under 5 USC Sec. 706.

IV. 30 USC SEC. 1268(c) IS UNCONSTITUTIONAL AS APPLIED AND ON ITS FACE AND JUDICIAL REVIEW CANNOT BE FORECLOSED DESPITE A FAILURE TO PREPAY A PENALTY.

Judicial review of agency action is proper when the constitutionality of an act and its implementing regulations is questioned. A constitutional challenge should not be precluded because a party has either failed to raise a constitutional question during administrative review, or having failed to resort to available administrative remedies, raises the question for the first time in a district court. Cf. Matthews v. Eldrige, 424 US 319, 329-331 ns. 10 and 11, 47 L.Ed.2d 18, 29-31 96 S.Ct. 893, 903-907 (1976).

This is in keeping with the rule that review of a constitutional challege to the statute upon which agency action rests is not barred because certain

facts or conclusions are presumptively made unreviewable by the words of the statute. Johnson v. Robison, 415 US 361, 367, 39 L.Ed. 389, 398, 97 S.Ct. 1160, 1166 (1974). As was the case in Johnson, supra, the statute in this case, 30 USC Sec. 1268(c), does not explicitly bar consideration of a constitutional challenge, and to the extent it was applied in such a manner it would be unconstitutional.

Also, to the extent 30 USC Sec. 1268(c) purports to restrict access to the courts, or if by application an operator is prevented from seeking judicial review, it is unconstitutional.

Section 1268(c) as applied is a violation of the Fifth Amendment in that it restricts access to the courts unreasonably and is in direct conflict with the statutory presumption of review

given to all litigants coming within the purview of 5 USC Secs. 701-706. Petitioner Moore has shown he is entitled to judicial review.

To the extent prepayment is required to achieve review of alleged arbitrary, capricious, illegal or unconstitutional agency action, it is an undue burden on Petitioner's statutory right to review and cannot be sustained. Lindsey v. Normet, 405 US 56, 76-78, 31 L.Ed.2d 36, 52-53, 92 S.Ct. 862, 875-877 (1972). Prepayment of a full assessment bears no relation to the actual harm to be prevented by the Surface Mining Control and Reclamation Act of 1977. See 30 USC Sec. 1202. Nor does such a requirement serve the objective of civil penalties. See 30 CFR 723.2.

In the instant case, the violations for which CO 200228 were

issued were not so serious a threat to the environment as to require cessation of mining activities when initially observed. If the violations cited in NOV 79-II-11-15 had been a serious threat to the environment, a cessation of mining activities would have been ordered pursuant to 30 USC Sec. 1271(a)(2). Yet, Petitioner Moore, who was not involved in the mining activities complained of, was expected to pay $45,000 for such violations. Subsection 1271 (a)(2) provides in pertinent part:

> (a)(2) When, on the basis of any Federal inspection, the Secretary or his authorized representative determines that any condition or practices exist, or that any permittee is in violation of any requirement of this Act or any permit condition required by this Act, which condition, practice, or violation also creates an imminent

> danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources, the Secretary or his authorized representative shall immediately order a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the condition, practice, or violation.

30 USC Sec. 1271(a)(2).

Requiring prepayment only serves to deprive an operator of the means to remedy any perceived harm to the environment by depriving him or her of the resources necessary to conduct mining or reclamation work, and the amount of the penalty may be unrelated to the actual cost of protecting the interest to be served. To that extent it is invalid. 405 US 56 at 76-78.

To the extent that prepayment is

perceived or cited as a more efficient way to ensure that operators comply with the Surface Mining Control and Reclamation Act, it is equally invalid. In the context of this case, an argument based on efficient administration must be rejected, at least so far as it is used to bar application of the Administrative Procedure Act and deny to Petitioner Moore the right to judicial review. Wong Yang Sung v. McGrath, 339 US 35, 46, 94 L.Ed. 616, 626, 70 S.Ct. 445, 452 (1950).

Conditioning access to judicial review on prepayment into escrow of an assessed penalty, as has been the construction of 30 USC Sec. 1268(c) by the courts which have considered the issue, is not the only time the condition is imposed. Prepayment also is required by Sec. 1268(c) even at the

administrative level for meaningful review of the penalty.

Even a temporary deprivation of property before a hearing is held is a deprivation rising to constitutional levels. Fuentes v. Shevin, 407 US 67, 85, 90 n.22, 32 L.Ed. 2d 556, 572, 576, 92 S.Ct. 1983, 1966-1997, 1999 (1972). In this case, Petitioner could not afford to prepay the penalty demanded of him at any stage of review, administrative or judicial. Therefore, he had no meaningful nor realistic means to protect his rights and property. For this reason 30 USC Sec. 1268(c), at least in this case and as applied, is invalid and cannot be used to bar the claims and challenges of Petitioner Moore.

As noted, Petitioner Moore could not afford to pay the proposed penalty

into escrow, and the cases which have upheld 30 USC Sec. 1268(c) against constitutional challenge are not controlling under the facts of this case.

Finally, this Court has not passed upon the constitutionality of the Act's civil penalty provisions, but has indicated that facts similar to those presented in the instant case would present a proper case for considering the issue. Hodel v. Virginia Surface Mining & Reclamation Association, 452 US 264, 304, 69 L.Ed. 2d 1, 33, 101 S.Ct. 2352, 2374 (1981). In the absence of a definitive ruling from this Court, the lower courts have felt justified in upholding the harsh provision, even when presented with egregious circumstances evident in the instant case. The Court in Hodel stated:

> In challenging the Act's civil penalty provision appellees did not allege that they, or any one of them have had civil penalties assessed against them. Moreover, the District Court did not find, as it did in ruling on the immediate cessation order provisions, that any appellee coal mine operators have been affected or harmed by any of the statutory procedures for the assessment and collection of fines. Thus, the record in the case belies any suggestion that there is a concrete case or controversy concerning the operation of these provisions. In these circumstances, we must conclude that appellees' challenge is premature and that it was improper for the court below to render a decision on this claim.
>
> Id. at 304.

The implication is that the district court was not necessarily incorrect in its ruling striking down the provisions, but rather that it was not rendered at the proper time in the

proper case.

The instant case presents precisely the case which the Court indicated would be ripe for consideration of the constitutionality of 30 USC Sec. 1268(c), because of the size of the penalty, the delay in its assessment, the inability of Petitioner Moore to pay, the prejudice which has resulted, and the failure to allow Petitioner judicial review under the Administrative Procedure Act. The Department of the Interior and the Secretary have maintained that under such circumstances imposition of a penalty and its collection might be barred. Save Our Cumberland Mountains, Inc. v. Watt, 550 F.Supp. at 982 (D.C. 1982).

CONCLUSION

For the foregoing reasons, the Petitioner requests the Court to bar the collection of the civil penalty sought, to grant Certiorari in this case, strike down 30 USC Sec. 1168 (c) as unconstitutional, and set a standard for enforcement of the Surface Mining Control and Reclamation Act of 1977 in line with Constitutional constraints.

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Knoxville, Tenn. 37939-1341
Phone 584-0241

APPENDIX

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UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE NORTHERN DIVISION

UNITED STATES OF AMERICA,	)
	)
v.	) CIV.
	) 3-82-524
JULIAN H. CREWS, ET AL	)

ORDER

For the reasons stated in a memorandum opinion this day passed to the Clerk for filing, it is ORDERED that plaintiff's motion for summary judgment in the amount of $45,000.00 be, and the same hereby is, granted. It is further ORDERED that defendants' motion for summary judgment be, and the same hereby is, denied.

Enter: October 29, 1982.

/s/_____
United States

District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE NORTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	CIV.
	)	3-82-524
JULIAN H. CREWS, ET AL	)	
	)	

M E M O R A N D U M

This is an action for collection of a civil penalty of $45,000.00 for failure to abate two violations of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. Sec. 1201 et seq. The case is before the Court on cross motions for summary judgment. Defendants do not contest the fact of the mining violation or the amount of the penalty. They allege, however, that Cessation Order 200228, on which the penalty was assessed, is

defective and void on its face.

On May 11, 1979 a reclamation specialist inspected defendants' surface mining operation in Campbell County, Tennessee. A Notice of Violation was issued, naming four specific violations of the Surface Mining Act. The notice required defendants to complete remedial measures by June 4, 1979. The Notice contained the following penalty provisions:

> For each violation covered by this Notice, a penalty of up to $5000 may be assessed for each day during which that violation continues.
>
> If you fail to abate any of the violations within the time set for abatement or to meet any interim tep, you must be assessed a minimum penalty of no less than $750 for each day during which the violation continues beyond the time set for abatement, and you must be issued a cessation

> order requiring you to cease surface coal mining operations on the portions relevant to the violations.

On July 2, 1979 the inspector again inspected the cite. He issued Cessation Order 200228 after finding defendants had not remedied two of the four violations. The Cessation Order provided:

> If this Order is being issued for failure to abate a violation(s) which was the subject of a prior Notice of Violation, a minimum penalty of $750 or more must be assessed for each day beginning today, during which the violation(s) continues beyond the abatement period set forth in that Notice.

The affirmative obligations and time for abatement remained as stated in May 11, 1979 Notice of Violation.

Defendants contend the Cessation Order is void because it required abatement prior to issuance. This argument is totally without merit. Plaintiff gave defendants from May 11, 1979 until July 2, 1979 to abate the violations without incurring a penalty. Defendants had notice of the consequences of failure to comply with the Notice of Violation and failed to do so. The Cessation Order merely implemented the sanctions contemplated in the Notice of Violation. This procedure complied with the Surface Mining Act, 30 U.S.C. Sec. 1271(a)(3):

> When, on the basis of a Federal inspection. . .the Secretary or his authorized representative determines that any permittee is in violation of any requirement of this chapter or any permit condition, required by this chapter; but such violation does not create an imminent danger to the

> health or safety of the public, or cannot be reasonably expected to cause significant, imminent environmental harm to land, air, or water resources, the Secretary or authorized representative shall issue a notice to the permittee or his agent fixing a reasonable time but not more than ninety days for the abatement of the violation and providing opportunity for public hearing.

Defendants also argue that issuance of the Notice of Assessment on April 2, 1982, more than 30 days after the Notice of Violation or Cessation Order, violated 30 U.S.C. Sec. 1268(c) and worked to their prejudice. We have previously held that the thirty-day time period is not jurisdictional. United States v. Moore, No. 3-81-520 (E.D. Tenn., filed July 21, 1982), appeal docketed, No. 82-5478 (6th Cir. Aug. 10, 1982). Defendant has failed to show,

and we cannot find, how he has been prejudiced by plaintiff's delay in this case.

For the foregoing reasons, it is ORDERED that plaintiff's motion for summary judgment in the amount of $45,000.00 be, and the same hereby is, granted. It is further ORDERED that defendants' motion for summary judgment be, and the same hereby is, denied.

/s/_____
United States
District Judge

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE NORTHERN DIVISION

UNITED STATES OF AMERICA,	)
	)
v.	) CIV.
	) 3-82-524
JULIAN H. CREWS, ET AL	)

ORDER

For the reasons stated in a memorandum opinion this day passed to the Clerk for filing, it is ORDERED that the motion to reconsider and make additional findings and conclusions be, and the same hereby is, granted to the extent of the memorandum opinion. It is further ORDERED that defendants' motion to amend judge be, and the same hereby is, denied.

Enter: December 13, 1982.

/s/_____
United States

District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE NORTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	CIV.
	)	3-82-524
JULIAN H. CREWS, ET AL	)	
	)	

M E M O R A N D U M

Defendants move to reconsider or amend the judgment of this Court entered October 29, 1982. On that date, after hearing the argument of counsel and considering defendants' position, we granted judgment against defendants in the amount of $45,000.00 for failure to abate surface mining violations.

Defendants contend that we did not fully consider all the relevant facts at the time judgment was entered.

Specifically, they point to the affidavit of defendant, Clarence Moore, filed November 1, 1982. At the hearing, however, defendants' counsel stated the substance of the affidavit and we considered it as if it had been filed. We will, however, address the specifics of the affidavit at this time. Moore alleges that he was prejudiced by receiving the notice of the penalty assessment during the early spring of 1982 rather than during the summer of 1979 when the violations occurred. He says he "quite possibly" would have had $45,000.00 in 1979 to place in escrow so that he might appeal the penalty. See 30 U.S.C. Sec. 1268(c). He further states that he was not responsible for the violations. We assume this is the issue he would have raised in 1979. Defendant Moore, however, could have

raised this issue without prepayment of any penalty in 1979. See 30 U.S.C. Sec. 1275; 43 C.F.R. Sec. 4.1160 et seq. Since he did not do so, his argument of prejudice by this delay is without merit. We also note that the delay may have worked to defendants' benefit as the potential penalty in 1979 was substantially higher under the then effective regulations. 30 C.F.R. Sec. 723.14; 42 Fed.Reg. 62703 (1977), Plaintiff's brief p. 5.

As stated above, defendant Moore also alleges that he was not responsible for the mining activities that lead to the issuance of Cessation Order 200228 that is the basis of this action. Since he failed to exhaust his administrative remedies as to this claim, he may not now raise the issue before this Court. 30 U.S.C. Sec.

1268(c). We note, however, that this contention is weak at best, since Moore has been engaged in other mining activities, leased the equipment used where the instant violations occurred, and failed to raise the issue until the present time. The scope of "agents" who may be held responsible for correction of surface mining violations is broad. See United States v. Dix Fork Coal Co., No. 81-5125 (6th Cir., filed Nov. 9, 1982). Moore's involvement, therefore, may well have been covered by the Surface Mining Act.

Moore also states that he did not receive notice of Violation 79-II-5 and Cessation Order 200208. As these documents are not the subject of the instant lawsuit, these contentions are without merit.

The Court in its memorandum

opinion of October 29, 1982 addressed the remaining legal contentions raised in the cross-motions for summary judgment. Further reconsideration of the case is therefore unnecessary. Accordingly, it is ORDERED that the motion to reconsider and make additional findings and conclusions be, and the same hereby is, granted to the extent of this memorandum. It is further ORDERED that defendants' motion to amend the judgment be, and the same hereby is, denied.

/s/_____
United States
District Judge

NO. 83-5014
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee	)
v.	) CIV.
	) 3-82-524
JULIAN H. CREWS, AND	)
CLARENCE MOORE, d/b/a	)
D.C. COAL COMPANY,	)
	)
Defendants-Appellants.	)

BEFORE: LIVELY, Cheif Judge, ENGEL, Circuit Judge and PECK, Senior Circuit Judge.

This cause having come onto be heard upon the record, the briefs and oral argument of the parties, and upon due consideration hereof,

It is ORDERED that the judgement of the district court be, and it hereby is, affirmed upon the opinion of the district court.

ENTERED BY ORDER OF THE COURT.

FILED: July 24, 1984

/s/_____
John P. Hehman, Clerk

-NO TEXT-

-NO TEXT-

CONSTITUTION OF THE UNITED STATES OF AMERICA

Amendment 5

Criminal actions--Provisions concerning--Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. Sec. 1254. Court of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at te instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. Sec. 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

28 U.S.C. Sec. 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(a) ...

(b) ...

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period of not exceeding sixty days.

(d) ...

(e) ...

(f) ....

30 U.S.C. Sec. 1268. Penalties

(a) ...

(b) Hearing. A civil penalty shall be assessed by the Secretary only after the person charged with a violation described under subsection (a) of this section has been given an opportunity for a public hearing. Where such a public hearing has been held, the Secretary shall make findings of fact, and he shall issue a written decision as to the occurrence of the violation and the amount of the penalty which is warranted, incorporating, when appropriate, and order therein requiring that the penalty be paid. When appropriate, the Secretary shall consolidate such hearings with other proceedings under section 521 of this Act. Any hearing under this section shall be of record and shall be subject to section 554 of title 5 of the United States Code. Where the person charged with such a violation fails to avail himself of the opportunity for a public hearing, a civil penalty shall be assessed by the Secretary after the Secretary has determined that a violation did occur, and the amount of the penalty which is warranted, and has issued an order requiring that the penalty be paid.

(c) Notice; waiver. Upon the issuance of a notice or order charging that a violation of the Act has occurred, the Secretary shall inform the operator within thirty days of the proposed amount of said penalty. The person charged with the penalty shall

then have thirty days to pay the proposed penalty in full or, if the person wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount to the Secretary for placement in an escrow account. If through administrative or judicial review of the proposed penalty, it is determined that no violation occurred, or that the amount of the penalty should be reduced, the Secretary shall within thirty days remit the appropriate amount to the person, with interest at the rate of 6 percent, or at the prevailing Department of the Treasury rate, whichever is greater. Failure to forward the money to the Secretary within thirty days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty.

(d) Recovery in civil action. Civil penalties owed under this Act, may be recovered in a civil action brought by the Attorney General at the request of the Secretary in any appropriate district court of the United States.

(e) ...

(f) ...

(g) ...

(h) ...

(i) ....

30 U.S.C. Sec. 1271. Enforcement.

(a) Notice; Federal inspection; waiver; cessation order; affirmative obligations; hearing; suspension or revocation of permits; contents of notices and orders; expiration date. (1) Whenever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this Act or any permit condition required by this Act, the Secretary shall notify the State regulatory authority, if one exists, in the State in which such violation exists. If no such State authority exists or the State regulatory authority fails within ten days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure and transmit notification of its action to the Secretary, the Secretary shall immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring unless the information available to the Secretary is a result of a previous Federal inspection of such surface coal mining operation. The ten-day notification period shall be waived when the person informing the Secretary provides adequate proof that an imminent danger of significant environmental harm exists and that the State has failed to take appropriate action. When the Federal inspection results from information provided to the Secretary by any person, the Secretary shall notify such person when the Federal inspection

is proposed to be carried out and such person shall be allowed to accompany the inspector during the inspection.

(2) When, on the basis of any Federal inspection, the Secretary or his authorized representative determines that any condition or practices exist, or that any permittee is in violation of any requirement of this Act or any permit condition required by this Act, which condition, practice, or violation also creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources, the Secretary or his authorized representative shall immediately order a cesstion of surface coal mining and reclamation operations or the portion thereof relevant to the condition, practice, or violation. Such cessation order shall remain in effect until the Secretary or his authorized representative determines that the condition, practice, or violation has been abated, or until modified, vacated, or terminated by the Secretary or his authorized representative pursuant to subparagraph (a)(5) of this section. Where the Secretary finds that the ordered cessation of surface coal mining and reclamation operations, or any portion thereof, will not completely abate the imminent danger to health or safety of the public or the significant imminent environmental harm to land, air, or water resources, the Secretary shall, in addition to the cessation order, impose affirmative obligations on the operator requiring him to take

whatever steps the Secretary deems necessary to abate the imminent danger or the significant environmental harm.

(3) When, on the basis of a Federal inspection which is carried out during the enforcement of a Federal program or a Federal lands program, Federal inspection pursuant to section 502, or section 504(b) or during Federal enforcement of a State program in accordance with subsection (b) of this section, the Secretary or his authorized representative determines that any permittee is in violation of any requirement of this Act or any permit condition required by this Act; but such violation does not create an imminent danger to the health or safety of the public, or cannot be reasonably expected to cause significant, imminent environmental harm to land, air, or water resources, the Secretary or authorized representative shall issue a notice to the permittee or his agent fixing a reasonable time but not more than ninety days from the abatement of the violation and providing opportunity for public hearing.

If, upon expiration of the period of time as originally fixed or subsequently extended, for good cause shown and upon the written finding of the Secretary or his authorized representative, the Secretary or his authorized representative finds that the violation has not been abated, he shall immediately order a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the violation. Such cesation order shall

remain in effect until the Secretary or his authorized representative determines that the violation has been abated, or until modified, vacated, or terminated by the Sectetary or his authorized representative pursuant to subparagraph (a)(5) of this subsection, the Secretary shall determine the steps necessary to abate the violation in the most expeditious manner possible, and shall include the necessary measures in the order.

(4) When, on the basis of a Federal inspection which is carried out during the enforcement of a Federal program or a Federal lands program, Federal inspection pursuant to section 502 or section 504 or during Federal enforcement of a State program in accordance with subsection (b) of this section, the Secretary or his authorized representative determines that a pattern of violations of any requirements of this Act or any permit conditions required by this Act exists or has existed, and if the Secretary or his authorized representative also find that such violations are caused by the unwarranted failure of the permittee to comply with any requirements of this Act or any permit conditions, or that such violations are willfully caused by the permittee, the Secretary or his authorized representative shall forthwith issue an order to the permittee to show cause as to why the permit should not be suspended or revoked and shall provide opportunity for a public hearing. If a hearing is requested the Secretary shall inform all interested parties of the time and place

of the hearing. Upon the permitte's failure to show cause as to why the permit should not be suspended or revoked, the Secretary or his authorized representative shall forthwith suspend or revoke the permit.

(5) Notices and orders issued to this section shall set forth with reasonable specificity the nature of the violation and the remedial action required, the period of time established for abatement, and a reasonable description of the portion of the surface coal mining and reclamation operation to which the notice or order applies. Each notice or order issued under this section shall be given promptly to the permittee or his agent by the Secretary or his authorized representative who issues such notice or order, and all such notices and orders shall be in writing and shall be signed by such authorized representatives. Any notice or order issued pursuant to this section may be modified, vacated, or terminated by the Secretary or his authorized representative. A copy of any such order or notice shall be sent to the State regulatory authority in the State in which the violation occurs: Provided, That any notice or order issued pursuant to this section which requires cessation of mining by the operator shall expire within thirty days of actual notice the operator unless a public hearing is held at the site or within such reasonable proximity to the site that any viewings of the site can be conducted during the course of the public hearing.

(b) ...

(c) ...

(d) ...

30 USC Sec. 1276. Judicial Review.

(a)(1) ...

(2) Any order or decision issued by the Secretary in a civil penalty proceedings or any other proceeding required to be conducted pursuant to 5 U.S.C. Sec. 554(1970) shall be suejct to judicial review on or before 30 days from the date of such order or decision in accordance with subsection (b) of this section in the United States District Court for the district in which the surface coal mining operation is located. In the case of a proceeding to review an order or decision issued by the Secretary under the penalty section of this Act, the court shall have jurisdiction to enter an order requiring payment of any civil penalty assessment enforced by its judgment. This availability of review established in this subsection shall not be construed to limit the operations of rights established in Section 520.

(b) **Findings of Secretary as conclusive.** The court shall hear such petition or complaint solely on the record made before the Secretary. Except as provided in subsection (a), the findings of the Secretary if supported by substantial evidence on the record considered as a whole, shall be conclusive. The court may affirm, vacate, or modify any order or decision or may remand the proceedings to the Secretary fcr such further action as it may direct.

(c) ...

(d) ...

(e) ...

CERTIFICATE

I, David A. Burkhalter, II, a member of the Bar of the Court, pursuant to Supreme Court Rule 19 and Rule 28, hereby certify that I have served Robert S. More, Special Assistant U.S. Attorney, Department of the Interior, P. O. Box 15006, Knoxville, TN 37901, and the Solicitor General, Department of Justice, Washington, D.C., 20530, with three (3) true and exact copies of the foregoing Petition and filed with the Court forty (40) true and exact copies, properly addressed to the Clerk of the Court, by depositing same in a United States Post office, first-class postage pre-paid, or with the Knoxville terminal Federal Express, a corporation offering overnight delivery of documents and other articles, this the 19th day of October, 1984.

David A. Burkhalter

David A. Burkhalter, II

STATE OF TENNESSEE
COUNTY OF KNOX

SUBSCRIBED and sworn to before me this the 19th day of October, 1984.

Suzanne Jeanice Cathey

Notary Public
My Commission Expires: 5/24/88

No. 84-749

FILED
DEC 7 1984
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

CLARENCE MOORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-749

CLARENCE MOORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the United States should be barred from collecting a civil penalty assessed against him for violation of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.*

1. Section 518 of the Surface Mining Act, 30 U.S.C. 1268, prescribes the manner for assessing civil penalties for violations of the Act. Section 518(a), 30 U.S.C. 1268(a), provides that the Secretary may assess civil penalties for violations of the Act (and shall assess such penalties where a cessation order has been issued), not to exceed $5,000 for each violation. Such penalties may be assessed "only after the person charged with a violation * * * has been given an opportunity for a public hearing" which "shall be of record and shall be subject to [the Administrative Procedure Act]". Section 518(b), 30 U.S.C. 1268(b). The critical provision for purposes of this case is Section 518(c), 30 U.S.C. 1268(c),

which provides that, after the Secretary informs the operator of the proposed amount of the penalty for a violation, "[t]he person charged with the penalty shall then have thirty days to pay the proposed penalty in full or, if the person wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount to the Secretary for placement in an escrow account." Should the operator prevail in whole or in part in the administrative proceedings or on judicial review, the deposited funds or the appropriate part of them must be returned with interest. *Ibid.* "Failure to forward the money to the Secretary within thirty days," however, "shall result in a waiver of all legal rights to contest the violation or the amount of the penalty." *Ibid.*

Petitioner failed to avail himself of these statutory procedures. Accordingly, the district court found — and the court of appeals agreed — that he waived any right to contest these penalties. The judgments of the courts below are correct and do not conflict with any decision of this Court or any other court of appeals. Therefore, further review by this Court is not warranted.

2. Petitioner's claim that the prepayment requirement of 30 U.S.C. 1268(c) is unconstitutional has been rejected by every court of appeals that has considered it. *Graham* v. *Office of Surface Mining Reclamation & Enforcement*, 722 F.2d 1106 (3d Cir. 1983); *Blackhawk Mining Co.* v. *Andrus*, 711 F.2d 753 (6th Cir. 1983); *B & M Coal Corp.* v. *Office of Surface Mining Reclamation & Enforcement*, 699 F.2d 381 (7th Cir. 1983). In fact, petitioner himself has unsuccessfully advanced this argument twice before, and this Court has refused to consider it. *United States* v. *Julian H. Crews and Clarence Moore d/b/a D.C. Coal Co.*, 705 F.2d 459 (6th Cir. 1982) (Table), cert. denied, 460 U.S. 1083 (1983); *United States* v. *Clarence Moore d/b/a Log Mountain Mining Co.*, 550 F. Supp. 811 (E.D. Tenn. 1982),

aff'd, 734 F.2d 17 (6th Cir. 1984) (Table), cert. denied, No. 84-41 (Oct. 9, 1984). There is no more reason for this Court to consider it now than there was on the prior occasions.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

DECEMBER 1984

DOJ-1984-12